

Federal Communications Commission

DA 02-1776

Before the
Federal Communications Commission
Washington, D.C. 20554

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AUG 19 2002

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In the Matter of

Amendment of Section 73.622(b)

Table of Allotments

Digital Television Broadcast Stations

(Kingston, New York)

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MM Docket No. 00-121

RM-9674

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2002

Released: July 29, 2002

By the Chief, Video Division:

1. The Chief, Video Division, Media Bureau, herein considers a Petition for Reconsideration and a Motion for Stay filed by WKOB Communications, Inc. ("WKOB"), licensee of WKOB-LP, New York, New York, with respect to the Commission's decision granting a change in the digital television channel allotment for WRNN-TV, Kingston, New York, from DTV Channel 21 to DTV Channel 48. *See Report and Order, Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Kingston, New York)*, 17 FCC Rcd 1485 (2002) ("Report and Order"). WRNN-TV Associates Limited Partnership ("WRNN"), licensee of WRNN-TV, filed oppositions to WKOB's pleadings, and WKOB filed replies thereto.

2. As set forth in greater detail in the *Report and Order*, WKOB opposed WRNN's DTV channel change proposal on the basis that it would effectively displace WKOB-LP's operation on Channel 48 in New York City. It argued that WKOB-LP had already been displaced from its initially authorized Channel 53, that Channel 48 was the only remaining displacement channel available to it, and that it would be forced to cease operations if WRNN's proposal were granted. It argued that although WKOB-LP was a secondary service, WRNN faced a heavy burden to alter the *status quo* in terms of the loss of WKOB-LP's service. Nevertheless, the staff, acting pursuant to delegated authority, found that WKOB-LP, as a secondary service, was not entitled to protection from WRNN's digital proposal. Moreover, inasmuch as WRNN's proposed channel change met City Grade service and interference protection requirements and otherwise furthered the Commission's goals with respect to the establishment of digital television service, the staff determined that the requested channel change served the public interest and was therefore approved.

3. In its petition for reconsideration, WKOB seeks to reverse the allotment of DTV Channel 48 at Kingston.¹ It alleges that the staff relied on facts concerning interference reduction

¹ WKOB also filed a motion to stay the effective date of the *Report and Order*, alleging that if WRNN is granted a

in approving the channel change which, in light of the specific modifications requested in WRNN's implementing construction permit application, are erroneous. Specifically, WKOB contends that, while WRNN's rulemaking proposal proposed various interference reductions toward Long Island, its implementing construction permit application proposes to increase instances of interference.² WKOB also asserts that the staff erred by "summarily dismissing" WKOB-LP's status as a low power station³ and "ignoring" or "changing" without adequate explanation the Commission's "announced policy of ensuring that digital station allotments do not have an unnecessary adverse impact on low power operations."

4. In opposition, WRNN rejects WKOB's claim that its construction permit application for DTV Channel 48 somehow undermines the staff's decision. In this regard, it notes that in allotment proceedings, proposals may be evaluated using assumed sites and facilities, and that issues relating to the actual technical parameters of a station's facilities are appropriately addressed at the application stage, rather than the allotment stage. It notes that WKOB has done so filing an informal objection to its modification application. Nevertheless, WRNN contends that its implementing construction permit application in no way undermines the basis for the channel change.⁴ WRNN further asserts that, contrary to WKOB's claims, the staff fully considered the impact of the proposed reallocation on WKOB-LP and correctly determined that it was not entitled to protection. It asserts that the Commission recognized that certain secondary operations such as low power stations, especially those in major markets, might be adversely

construction permit for Channel 48, WKOB-LP will lose both its displacement channel and the money spent at auction to secure it, and be forced out of business. It alleges that it meets the Commission's requirements necessary for the grant of a stay motion, including the filing of subject petition for reconsideration, which it believes it is likely to be granted. See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). However, in light of our action herein, WKOB's motion for stay is appropriately denied.

² WKOB also filed an "Objection" to WRNN's construction permit application (File No. BPCDT-20020130AAQ). It requests that that application be dismissed as premature or that processing be deferred pending consideration of the instant petition for reconsideration to reverse the subject allotment. It also suggests that in light of the coverage proposed in that application, certain legal or technical issues might exist that the Commission may not have considered. In light of our action today disposing of the issues raised in the petition for reconsideration, the matters raised in this regard in WKOB's objection are moot. Moreover, the staff has reviewed the construction permit application, and has determined that it meets our legal and technical requirements. Therefore, we will herein deny WKOB's objection to the construction permit application, and grant that application by separate action this day.

³ As noted in the *Report and Order*, WKOB was denied eligibility for Class A Low Power Television status, which might otherwise entitle WKOB-LP additional interference protections. Its subsequent petition for reconsideration of that decision was denied, and the Commission denied its subsequent application for review on January 11, 2002. WKOB reports that it has filed a petition for reconsideration of the Commission's decision that, if reversed, would afford WKOB greater interference protection.

⁴ In its reply pleading, WKOB asserts, among other things, that technical parameters of a proponent's implementation plans are a critical aspect of a DTV allotment proposal. It argues that to conclude otherwise is arbitrary and capricious, as well as statutorily unlawful in that other stations impacted by the implementing proposal are denied the ability to comment or offer counterproposals. Nevertheless, WKOB maintains that even if, as a general rule, the Commission structures allotment rulemaking around theoretical reference points and hypothetical facilities, it should not do so in this case because of the "substantial deviation" of the proposed WRNN facility.

impacted and even forced from the air during the implementation of DTV service. It argues that WKOB was well aware of those risks when it sought to acquire Channel 48 as its displacement channel.⁵ Finally, WRNN asserts that both it and the public will suffer harm if it is forced to further delay the implementation of its digital service.

DISCUSSION

5. WKOB has not established that reconsideration and reversal of the *Report and Order* is warranted. As WRNN correctly notes, when a party seeks to amend the Table of Allotments, hypothetical reference coordinates and facilities are used for purposes of making the allotment. The rulemaking proponent is not required to specify an actual transmitter site from where the station would be operated, only a theoretically fully spaced transmitter site location, *i.e.*, a site from which it affords appropriate signal coverage and interference protection. Inasmuch as WRNN's rulemaking proposal met all such signal coverage and interference requirements, the channel change was not premised on interference reduction. Moreover, the fact that more interference may be theoretically caused by WRNN's proposed facilities does not necessarily mean that that such interference is *prohibited* interference that undermines the validity or adoption of the channel change. In any event, any interference engendered by WRNN's proposed facilities is an issue relevant to the implementing construction permit application, where WKOB has filed its objection.

6. The gravamen of WKOB's objection is that protection was not afforded to its low power station in the adoption of this rulemaking proposal. As noted in the *Report and Order*, WKOB-LP is a secondary service and, as such, is simply not entitled to the level of protection it desires. That is not a change or misapplication of Commission policy. Throughout this proceeding, WKOB has routinely referenced the Commission's language in 1997's *Advanced Television Systems*, 12 FCC Rcd 14588, that proposed modifications to the DTV Table should, where possible, avoid impacting low power stations, to support its claim that its low power service should not be disrupted if technically unnecessary. However, the Commission later refined that policy, as noted in the *Report and Order*, to protect such facilities only to the extent that they receive, or are eligible to receive, Class A status.⁶ In so doing, the Commission acknowledged that the impact of DTV transition "would have significant adverse effects on many stations, particularly [non-Class A] LPTV stations operating in urban areas where there are few, if any, available replacement channels for displaced stations."⁷ Such is the position WKOB claims to find itself. Nevertheless, WKOB was well aware of that possibility when it sought to

⁵ In its reply, WKOB dismisses WRNN's assertion that WKOB-LP has no protection rights, and maintains that the Bureau's allotment decision in this case cannot be reconciled with the Commission's policy "not to destroy low power television service where it is not necessary to establish DTV service."

⁶ See *In the Matter of Establishment of a Class A Service*, 15 FCC Rcd 6355, 6370-71 (2000), *clarified on recon.*, 16 FCC Rcd 8244 (2001).

⁷ 16 FCC Rcd at 8247.

obtain Channel 48 in New York City. Contrary to WKOB's claims, that does not warrant reconsideration of the adopted channel change, nor justify the requested deviations from the Commission's rulemaking or DTV implementation policies in this case.

7. Accordingly, IT IS ORDERED, That the Motion for Stay and the Petition for Reconsideration filed by WKOB Communications, Inc. ARE DENIED. IT IS FURTHER ORDERED That WKOB's Objection to WRNN's construction permit application (File No. BPCDT-20020130AAQ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau